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No. 97 1118 DEC 29 1997

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In The

Supreme Court of the United States

October Term, 1997

DANIEL P. BRESNAHAN,

Petitioner,

vs.

CALIFORNIA HIGHWAY PATROL; DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ASSISTANT COMMISSIONER FIELD ROBERT RENGSTORFF; OFFICER RONALD JONES; SERGEANT JAMES BALDUCKI; SERGEANT MICHAEL DOMINO; SERGEANT WESLEY BEAN; DEPUTY CHIEF CLARENCE TUCK; CAPTAIN GENE TOWLE; and DOES 1 through 100, Inclusive,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED

Is Petitioner, a California State Highway Patrolman, who received an Adverse Action that resulted in a loss of salary and privileges, and did not receive any hearing, although a hearing was provided for by law, denied "due process"?

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Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported (App. A). The judgment of the district court, dated April 2, 1996, is also unreported (App. B). The three orders of the district court granting summary judgment to the Respondents are printed in Appendices B, C and D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1997. A timely petition for rehearing was denied by order of the Court of Appeals, dated September 30, 1997 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

California Government Code (G.C.) Section 3303 defines an Adverse Action as:

> For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, *reduction in salary*, written reprimand, or transfer for purposes of punishment.

(Emphasis added).

California Code of Regulations (CCR) Title 2, Article 4, Paragraph 51.1(b) defines an Adverse Action:

> "Adverse Action" means an action taken by an appointing power to discipline an employee and includes formal reprimand, suspension, *reduction in salary*, demotion and dismissal.

(Emphasis added).

California Code of Regulations (CCR) Title 2, Article 1, Paragraph 52a(2) requires a State Personnel Board hearing for appeal of an Adverse Action:

> The following shall be assigned to the hearing office for hearing: Appeal of Adverse Action pursuant to Government Code section 19575 or 19590.

STATEMENT OF THE CASE

Petitioner Bresnahan was removed from a Specialty Pay Position and reassigned to a lower paying position. Under Law, such an action is an Adverse Action, which specifically entitles the individual to a full evidentiary hearing conducted by the State Personnel Board. The defendants, acting in concert, denied Petitioner Bresnahan *any* hearing, therefore denying Petitioner due process.

Petitioner Bresnahan, having been denied due process, filed the instant case in the district court, for violation of his civil rights. The district court granted summary judgments, or dismissed, in favor of all defendants; therefore denying Petitioner Bresnahan his right to trial on civil rights issues.

Petitioner Bresnahan, having been denied his right to trial by the district court, appeals to the Ninth Circuit Court. The

Ninth Circuit Court affirmed the decision of the district court, and further denied Petitioner Bresnahan his due process right to trial, in opposition to United States Supreme Court and prior Ninth Circuit Court decisions which require that the case be sent to trial. Petitioner Bresnahan petitioned the Ninth Circuit Court for a rehearing, which was denied.

Petitioner Bresnahan filed this timely petition for a writ of certiorari.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The original complaint was made pursuant to the United States Constitution and the provisions of 42 U.S.C. §§ 1983, *et seq.*, and the jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343 and 18 U.S.C. §§ 241 and 242. The acts complained of occurred in that district, therefore venue lay in that district pursuant to 28 U.S.C. § 1391.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION AND RENDERED ITS DECISION IN CONFLICT WITH UNITED STATES SUPREME COURT, CALIFORNIA SUPREME COURT AND PRIOR NINTH CIRCUIT COURT DECISIONS WHEN IT FAILED TO RULE THAT PETITIONER BRESNAHAN, HAVING RECEIVED AN ADVERSE ACTION FROM HIS EMPLOYER, WAS DENIED DUE PROCESS BECAUSE *HE NEVER RECEIVED ANY HEARING*, NEVER RECEIVED A STATE PERSONNEL BOARD HEARING, AND NEVER RECEIVED A JURY TRIAL.

Petitioner Bresnahan was illegally removed from a specialty pay position as a helicopter pilot, and reassigned to a lower paying position. The California Supreme Court has ruled that removal from a specialty pay position, and reassignment to a lower paying position, is an Adverse Action, which entitles the individual to a hearing. *Baggett v. Gates*, 32 Cal. 3d 128, 185 Cal. Rptr. 232, 649 P.2d 874 (1982) and *White v. County of Sacramento*, 31 Cal. 3d 676, 682, 683, 183 Cal. Rptr. 520, 646 P.2d 191 (1982). California law also establishes that a reduction in salary constitutes an Adverse Action: (California Government Code Section 3303, and California Code of Regulations (CCR), Title 2, Article 4, Section 51.1(b)). California law mandates that an individual who receives an Adverse Action is entitled to a full evidentiary hearing conducted by the State Personnel Board (SPB) (California Code of Regulations (CCR) Title 2, Article 4, Paragraph 52a(2)). That right to an SPB hearing is absolute; once demanded by an appellant, no one else can waive that right, or substitute any other hearing process. The defendants denied

Petitioner Bresnahan that SPB hearing, attempted to force him into some other hearing process not allowed by California law, then failed to provide *any* hearing at all.

A. The Lower Courts, In Opposition To United States Supreme Court And Prior Ninth Circuit Court Decisions, Granted Judgment Against Petitioner Bresnahan Even Though He Was Denied Due Process Because He Never Received *Any* Hearing.

The defendants deprived Petitioner Bresnahan of the federally protected rights of both property (salary) and privilege (flight time). Deprival of either of those rights entitled Petitioner Bresnahan to a hearing, but the defendants failed to provide him *any* hearing.

Failure to provide *any* hearing is an absolute denial of due process. This Court has long held that an individual has been denied due process if a state deprives the individual of a property interest without providing a hearing.

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) states:

> The fundamental requirement of due process is the opportunity to be heard at a meaningful time, and in a meaningful way. This court has consistantly held that some form of hearing is required before an individual is finally deprived of a property interest.

Parratt v. Taylor, 451 U.S. 527, 540, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) states:

> The fundamental requirement of due process is the opportunity to be heard and this opportunity must

> be granted at a meaningful time and in a meaningful manner; some kind of hearing is required at some time before a state may finally deprive a person os his property interests . . .

The Ninth Circuit Court is required to rule in accordance with prior United States Supreme Court and Ninth Circuit Court decisions.

In Re Visness, 57 F.3d 775, 778 (9th Cir. 1995) states:

> This panel is bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines these decisions.

In accordance with *Mathews*, *supra* and *Parratt*, *supra*, Petitioner Bresnahan was denied due process because he never received *any* hearing. *In Re Visness*, *supra* required the Ninth Circuit Court to rule the same. Petitioner Bresnahan advised the court of the requirements of those prior decisions, but the courts failed to comply. Instead, the Ninth Circuit Court affirmed the district court judgment against Petitioner Bresnahan (App. A and B), even though he was denied due process because he never received *any* hearing. That judgment was made without any authority, and in opposition to United States Supreme Court, and prior Ninth Circuit Court decisions, as stated hereinabove.

B. The Courts, In Opposition To United States Supreme Court And Prior Ninth Circuit Court Decisions, Failed To Rule That Petitioner Bresnahan Was Denied Due Process Because He Did Not Receive The Specific SPB Hearing Required By California Law.

As stated previously, California law and Supreme Court decisions established that Petitioner Bresnahan was not just

entitled to any hearing for having received an Adverse Action, he was specifically entitled to an SPB hearing. The Ninth Circuit Court was required to rule the same.

Elliot v. City of Union City, 25 F.3d 800, 802 n.3 (9th Cir. 1994) states:

> In the absence of controlling state precedent, we must decide all California cases as the California Supreme Court would decide it.

The Ninth Circuit Court, even after being advised of the requirements of *Elliot*, *Baggett* and *White*, *supra*, 3303 G.C. and CCR 51.1(b) and 52a(2), apparently ignored those precedents and failed to rule that Petitioner Bresnahan was specifically entitled to an SPB hearing.

Having summarily dismissed the laws of California, the court failed to rule that Petitioner Bresnahan was denied due process because he received neither the SPB hearing to which he was entitled by California law, nor *any* hearing. This Court has ruled that due process is determined by state law, not by the court.

Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678 (1875) states:

> What is due process of law in the states is regulated by the law of the state.

Logan v. Zimmerman Brush Co., 455 U.S. 422, 429, 430, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) states:

> Similarly, the 14th Amendments' due process clause has been interpreted as preventing the states from denying potential litigants use of established

> adjudicatory procedures, when such an action would be the equivalent of denying them the opportunity to be heard upon their claimed rights.

California law has established that Petitioner Bresnahan was specifically entitled to an SPB hearing; *Elliot, supra* requires the Ninth Circuit Court to rule accordingly; *Walker, supra* and *Logan, supra* dictate that denial of that right is a denial of due process; and *In Re Visness, supra* dictates that the court *had no discretion* to make any ruling other than that Petitioner Bresnahan was denied due process because he did not receive the SPB hearing to which he was entitled by law. However, the Ninth Circuit Court, contrary to United States Supreme Court and prior Ninth Circuit Court decisions, and California law, failed to rule that Petitioner Bresnahan was denied due process (App. A).

C. The Court, In Opposition To United States Supreme Court And Prior Ninth Circuit Court Decisions, Has Denied Petitioner Bresnahan His Right To A Jury Trial.

The court, having failed to comply with all of the previously stated laws, rendered judgment against Petitioner Bresnahan, denying him his right to a jury trial (App. A and B). That right to a jury trial is absolute in cases of this nature.

Curtis v. Loether, 415 U.S. 189, 194, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974) states:

> The seventh amendment does apply to actions enforcing statutory rights, and requires a jury trial on demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

Denial of Appellant Bresnahan's right to an SPB hearing, which was established by California law, meets the requirements of *Curtis*, *supra* and mandates a trial. The court, without authority to do so, and contrary to United States Supreme Court decisions, denied Petitioner Bresnahan his right to trial.

Petitioner Bresnahan lost both pay and flight time. The Ninth Circuit Court, in its own prior ruling, stated that these are federally protected rights of property and privilege, the loss of either of which require that the case be sent to trial. *Stiesberg v. State of California*, 80 F.3d 353, 356 (9th Cir. 1996). The court was advised by Petitioner Bresnahan of the requirements of *Stiesberg*, *supra*, however, the court, without authority to do so, and in violation of its own prior decision, denied Petitioner Bresnahan his right to trial (App. A).

D. The Trial And Appellate Court, Contrary To United States Supreme Court Decisions, Granted Summary Judgment For All The Defendants And Denied The Jury Trial To Which Petitioner Bresnahan Was Entitled, Even Though Overwhelming Genuine Issues Of Material Fact Existed.

In the instant case summary judgment was prohibited because genuine issues of material fact remained, which could only be resolved during trial. Without trial, the court did not have a complete record on which to base its decision. When significant issues of fact are presented, the incomplete records developed prior to trial are simply insufficient to allow a final decision on the merits. As a matter of law, Petitioner Bresnahan is entitled to a full evidentiary presentation before a final decision is reached and, when issues of fact are in dispute, such decisions must initially be rendered by the jury, which has the responsibility in the district court to determine questions of fact. The court cannot make assumptions which invade the factfinders province, particularly when the jury might well reach a different

conclusion after the evidence is fully presented. The court should grant a motion for summary judgment only when evidence, viewed in a light most favorable to the nonmoving party, presents no genuine issues of material fact, *i.e.*, when reasonable minds cannot differ as to the import of evidence before the court. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

Maynard v. Durham and Southern R. Co., 365 U.S. 160, 163, 81 S. Ct. 561, 5 L. Ed. 2d 486 (1961) states:

> It is not for the judges to resolve an issue of fact on which fair minded jurors might honestly differ.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 248, 257, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986) states:

> Summary Judgment does not lie if a dispute about material facts is genuine so that a reasonable jury could return a verdict for the non moving party.

The genuine issues of material fact in the instant case include whether Petitioner Bresnahan was illegally removed from a specialty pay position, whether "double jeopardy" prevented any action, whether evidence was falsified, whether allegations were time barred from use, whether the defendants conspired to intentionally subvert California law, whether the defendants illegally shifted the burden of proof, whether the defendants conspired to prevent an SPB hearing from being provided, whether it was the defendants' fault that no hearing was conducted, and whether the defendants perjured themselves during deposition. The evidence in support of Petitioner's case is extensive and compelling. The court has seen little of the evidence, and a jury has seen none, because of the courts' denial of Petitioner's right to a jury trial. Any one of these genuine

issues of material fact is sufficient to prevent summary judgment and send the case to trial. But the court, even though advised by Petitioner Bresnahan of the requirements of *Anderson*, *supra* and *Diebold*, *supra*, granted summary judgment in favor of the defendants and denied Petitioner Bresnahan his right to trial, all in opposition to United States Supreme Court decisions (App. B).

II.

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED OR USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, THAT IT CALLS FOR AN EXERCISE OF THIS COURT'S REVIEW, AS ESTABLISHED BY SUPREME COURT RULE 10A.

The actions of a court are limited by the authority invested in it by law. When the courts accepted jurisdiction in this case, they also accepted their responsibility to render decisions in conformance with the applicable laws. In other cases there may be issues which are subject to the discretionary powers of the court. In the instant case there are no issues in the appeal in which the court has "discretionary" powers. Instead, the opposite is true.

The laws relevant to this case require the court to rule in a specific manner. Petitioner Bresnahan advised the courts of the requirements of those laws, leaving no room for the court to act as if the laws did not exist, or that the court was not aware of the requirements of the laws cited. The courts, however, ruled directly opposite to, and in violation of, the laws cited. When the law stood in its way, the court ignored the law. When asked to provide the authority for its decisions at a rehearing, the Ninth Circuit Court denied the rehearing, and failed to provide any

authority for its original decisions (App. B). The court then exacerbated its failure to comply with the law, by failing to provide any stated opinion or rationale for its decisions. Failure of the courts to provide either authority or argument for their actions has denied Petitioner the rights to which he is entitled.

CONCLUSION

Petitioner Bresnahan provided the district court and the Ninth Circuit Court with federal and state law which was applicable to the issues in the instant case. These laws restricted the courts to very specific rulings, *i.e.*, that Petitioner Bresnahan was denied due process because he did not receive *any* hearing; because he did not specifically receive the SPB hearing to which he was entitled by law; and because he was denied a jury trial. The courts had absolutely no authority to make rulings in opposition to the above. The lower courts cannot claim that they were not provided with these requirements, or did not know what the requirements were.

The Ninth Circuit Court ignored the requirements of those laws, and sanctioned the same rulings from the district court; actions which are a significant departure from the accepted course of judicial proceedings. Had the Ninth Circuit Court rendered an opinion supported by law, it would have provided argument, well supported by case law, which would have defeated Petitioner Bresnahan's arguments; if it had any. Not only did it completely fail to do that, it prevented scrutiny of its actions in the case, by denying publication of its rulings (App. A). These actions denied Petitioner Bresnahan due process and his right to a jury trial, in spite of the fact that the entire purpose of the federal civil rights act is to serve as a antidote to discriminatory state laws, to protect federal rights where state law is inadequate and to protect federal rights *where state processes are available in theory but not in practice*. Failure to

provide a jury trial has a far reaching effect because of the impact of the results of the case on the hundreds of thousands of California State employees.

Petitioner Bresnahan seeks the following decision from this Court:

Grant the writ of certiorari, and rule per curiam that:

A. Petitioner was denied due process because he never received any hearing.

B. Petitioner was denied due process because he never received the State Personnel Board hearing required by law.

C. Petitioner was denied due process because he never received a jury trial.

D. This case should be remanded for trial.

It is Appellant Bresnahan's position that the case law and law cited so clearly and absolutely establish a denial of due process, that this Court should render a summary disposition on the merits in his favor. These facts demonstrate the need for review of this case by this Court.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 27, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-55611

D.C. No. CV-94-00852-AHS

DANIEL P. BRESNAHAN,

Plaintiff-Appellant,

v.

CALIFORNIA HIGHWAY PATROL; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ROBERT RENGSTORFF, Assistant Commissioner Field; RONALD JONES, Officer; JAMES BALDUCKI, Sergeant; MICHAEL DOMINO, Sergeant; WESLEY BEAN, Sergeant; CLARENCE TUCK, Deputy Chief; GENE TOWLE, Captain,

Defendants-Appellees.

ORDER*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix A

Argued and Submitted August 6, 1997
Pasadena, California

Before: HALL, and T.G. NELSON, Circuit Judges, and WINMILL,** District Judge.

The judgment of the district court is AFFIRMED for the reasons set forth in the orders of the district court filed on October 12, 1995; March 20, 1996; and April 2, 1996.

IT IS SO ORDERED.

** Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FILED APRIL 2, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SA CV 94-852 AHS (EEx)

DANIEL P. BRESNAHAN,

Plaintiff,

v.

CALIFORNIA HIGHWAY PATROL et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; ORDER DENYING PLAINTIFF'S MOTION TO FILE SECOND AMENDED COMPLAINT, TO STAY ALL PROCEEDINGS, AND TO CONTINUE MOTION CUT-OFF DATES

I.

PROCEDURAL HISTORY

On January 8, 1996, defendants Towle, Tuck, Bean, Dimino, Balducki, Rengstorff and Jones filed a Motion for Summary Judgment. On January 22, 1996, plaintiff filed opposition. Defendants filed their reply on January 29, 1996.

Appendix B

On January 9, 1996, plaintiff filed a Motion to File Second Amended Complaint; for Order to Stay all Proceedings; and to Continue Discovery and Motion Cut Off Dates. Defendant Department of Personnel Administration ("DPA") filed opposition on January 22, 1996. Defendant California Association of Highway Patrolmen ("CAHP") filed opposition on January 24, 1996. Also on January 24, 1996, defendants Towle, Tuck, Bean, Dimino, Balducki, Rengstorff and Jones filed opposition. Plaintiff filed his reply on February 12, 1996.

The matters were noticed for hearing on the Court's February 20, 1996, calendar. The Court found the matters appropriate for submission on the papers without oral argument. *See* Local Rule 7.11 (the Court may dispense with oral argument on any matter unless otherwise required); Fed. R. Civ. P. 78. The matters were, therefore, removed from the Court's February 20, 1996, hearing calendar.

II.

FACTUAL SUMMARY

Plaintiff is a State Traffic Officer with the California Highway Patrol ("CHP"). Plaintiff was assigned as a helicopter pilot to the CHP's Border Division Air Operations Unit in Thermal, California. On March 22, 1993, plaintiff was notified that he was temporarily removed from flight status pending an internal CHP investigation into plaintiff's performance as a helicopter pilot and safety officer. On October 10, 1993, plaintiff received a Notice of Administrative Removal for Cause from the CHP.

The notice, dated September 29, 1993, informed plaintiff

that the CHP investigation reached the following conclusions: (1) plaintiff did not utilize the departmental preflight start-up/ shut-down checklist prior to each flight as required; (2) plaintiff was involved in a preventable aircraft incident resulting in extensive damage to the division helicopter; (3) plaintiff used poor judgment in selecting a landing site on April 8, 1992; (4) plaintiff failed to make proper pre-flight weather checks and also failed to notify the communication center regarding an off-airport landing on October 12, 1992; and (5) plaintiff demonstrated poor flight safety judgment and violated departmental policy in late 1992 when landing near power lines at an off-airport site.

The notice also stated: (1) plaintiff was "administratively removed" from his assignment at the Air Operations Program and his specialty flight pay would be discontinued; (2) plaintiff was reassigned to the Indio area; (3) the reassignment was not an "adverse action" or intended to be disciplinary; and (4) plaintiff was entitled to file an appeal per the provisions of Article V of the Grievance, Arbitration, and Complaint Procedures of the Unit 5 Memorandum of Understanding ("MOU") (collective bargaining agreement between the CHP and CAHP).

The MOU sets forth the grievance procedure: the employee must first discuss the matter informally with a supervisor and then he may go through four levels/steps of appeal. If the employee is not satisfied with the DPA's decision in step 4, then he may appeal the decision to a neutral arbitrator jointly selected by the parties. If the parties cannot agree on an arbitrator, the American Arbitration Association or California State Mediation Service shall select an arbitrator. The arbitrator's decision is final and binding.

Appendix B

On October 29, 1993, plaintiff filed an Employee Contract Grievance, in accordance with the MOU. However, plaintiff proceeded through only four levels of the appeals process and failed to arbitrate the DPA's decision.

On September 20, 1994, plaintiff filed his Complaint in this action, alleging that defendants conspired to deprive him of his civil rights, in violation of 42 U.S.C. § 1983, by causing his transfer and denying him due process with respect to the grievance procedure. Plaintiff claims that he was entitled to a full administrative hearing before an administrative law judge, rather than the binding arbitration procedure afforded by the MOU. Plaintiff argues that but for a "secret" Side Letter Regarding Alternative Pay between the State of California and the CAHP, which provided that the MOU grievance procedures apply to his situation, his transfer would have been deemed an "adverse action," entitling him to the right to appeal the DPA decision to the State Personnel Board ("SPB"). Plaintiff seeks $2 hundred million in general damages and $2 hundred million in punitive damages.

III.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. *Defendants' Contentions*

Defendants initially argue that plaintiff was given "all the process due." In support of this proposition, defendants note that in its Order Granting Defendant CAHP's Motion for Summary Judgment, dated October 12, 1995, the Court held, as a matter of law, that the arbitration procedure set forth in the MOU fully complied with the due process requirements of the

United States Constitution. Defendants contend that the remaining alleged violations of plaintiff's rights must be resolved within the grievance/arbitration procedure or pursuant to California Government Code Section 3309.5, which gives the California Superior Court initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of the Public Safety Officers Procedural Bill of Rights Act.

Defendants further argue that, given the Court's ruling that plaintiff was not deprived of his right to due process by being required to utilize the grievance/arbitration procedure, there can be no "conspiracy" to deprive plaintiff of his due process in violation of 42 U.S.C. § 1983. Defendants contend that the nature of the alleged acts in a civil conspiracy must have subjected plaintiff to a deprivation of his right of due process. *Hoffman v. Halden*, 258 F.2d 280, 294-295 (1959). Defendants assert that the Complaint alleges no specific acts in violation of plaintiff's right of due process, nor does it allege any other constitutional violation.

Defendants next argue that they are entitled to qualified immunity since their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In conclusion, defendants argue that, as the prevailing party, they are entitled to attorneys' fees under 42 U.S.C. § 1988 since plaintiff's suit became vexatious, frivolous, groundless, meritless and unreasonable in October 1995, when the Court ruled, as a matter of law, that the arbitration procedure set forth in the MOU fully complied with the due process requirements of the United

States Constitution. *See Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980).

B. *Plaintiff's Contentions*

Plaintiff argues that contrary to defendants' assertions, the Court's October 12, 1995, order did not resolve all of plaintiff's claims against defendants. Plaintiff contends that the Court must still determine what the agreements implemented by the CHP, CAHP and DPA require, and whether defendants complied with these requirements.

Plaintiff next argues that his removal from a specialty pay position constituted an "adverse action" that entitled plaintiff to a hearing before the State Personnel Board.

Plaintiff further contends that the grievance process approved by the Court is not legitimate since it was not adhered to by defendants. Plaintiff argues that when he filed a grievance, as required in order to obtain a hearing, the grievance was denied. Plaintiff claims that this denial demonstrates defendants' true intention to deprive plaintiff of his due process rights. Accordingly, plaintiff argues that defendants have "denied plaintiff the very process that this Court has said is proper due process."

Plaintiff next argues that defendants' investigation of plaintiff violated plaintiff's right of due process since defendants failed to comply with the requirements of the Public Officers Bill of Rights Act (the "Act"). Specifically, plaintiff contends that: (1) he was not interrogated in accordance with the Act's requirements; (2) plaintiff was denied a promotion and right to administrative appeal; (3) defendants retaliated against plaintiff

for exercising his rights under the Act; and (4) plaintiff was not given the opportunity to read and sign adverse documents before they were placed in his personnel file.

Plaintiff further alleges that defendants made false allegations to facilitate the removal of plaintiff from his specialty pay position. Plaintiff contends that defendants exchanged with one another "secret files" that they had been keeping on plaintiff in violation of the Act. Plaintiff also contends that defendants used "inadmissible" evidence to support plaintiff's removal, including three-year-old documents detailing allegations in an adverse action against plaintiff (plaintiff contends that under the Act, these documents should have been "purged" for confidentiality purposes).

Finally, plaintiff argues that defendants are not entitled to qualified immunity since defendants intentionally violated California law and CHP policy. Plaintiff contends that "no reasonable officer would have done that."

C. *Defendants' Reply*

In response, defendants assert that there is a complete failure of proof by plaintiff that he has a constitutional right to a SPB hearing. Accordingly, defendants argue that all of plaintiff's other claims are immaterial.

Defendants further argue that plaintiff has not identified any act by any defendant that violated plaintiff's constitutionally protected rights.

Appendix B

DISCUSSION

A. *Summary Judgment Standard*

In order to succeed on a motion for summary judgment, a plaintiff must affirmatively show, through admissible evidence, that there is no genuine issue of material fact as to each element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To defeat a plaintiff's motion, a defendant must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

In order for a defendant to succeed on a motion for summary judgment, it must demonstrate that there is no genuine issue of material fact by pointing out the absence of evidence produced by the plaintiff to support its case. *Celotex*, 477 U.S. 317. In the alternative, a defendant may demonstrate through admissible evidence that there is no triable issue of material fact as to each element of its affirmative defenses and that it is therefore entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

On the other hand, in order to overcome a defendant's motion for summary judgment, a plaintiff must set forth specific facts indicating that there is a genuine issue for trial. In other words, plaintiff must present evidence sufficient for a reasonable jury to find for it instead of defendant. Fed. R. Civ. P. 56(e). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

"A complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex*, 477 U.S. at 323. Where the material facts are under the moving party's control, the party's failure to produce such

evidence may either preclude summary judgment or allow further discovery. *See Fontenot*, 780 F.2d at 1195. The Court is not to determine issues of credibility on a motion for summary judgment; instead, the truth of each party's affidavits must be assumed. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

B. *Analysis of the Motion*

Since plaintiff has presented no admissible evidence to support his claims that defendants violated plaintiff's right to due process by: (1) failing to comply with the "Agreement"; (2) improperly investigating plaintiff; or (3) making false allegations and relying on inadmissible evidence to support plaintiff's removal from his specialty pay position, the Court grants summary judgment in favor of defendants. In his Statement of Controverted Facts and Conclusions of Law, plaintiff "supports" his assertions by referring to the Complaint and defendants' depositions. With regard to the depositions, plaintiff claims that the facts supporting his position are somewhere in the "hundreds and hundreds of pages" of transcripts, but that, due to time constraints, plaintiff was unable to "flag" the relevant portions. These depositions have not been lodged with the Court.

Plaintiff's "support" for his assertions contravenes both the Local Rules and the Federal Rules of Civil Procedure. Local Rule 7.14.3 states that:

> In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a)

included in the 'Statement of Genuine Issues' and (b) *controverted by declaration or other written evidence filed in opposition to the motion.*

Plaintiff fails to provide the requisite written evidence or declarations to support the allegations in his Complaint. Instead, plaintiff relies on the Complaint itself to support his factual assertions, in direct violation of Federal Rule of Civil Procedure 56(e). Further, plaintiff failed to comply with Local Rule 8.1.2 by either lodging original depositions with the Clerk at least ten days in advance of the motion hearing date, or requiring opposing counsel to do so. Absent the requisite evidentiary support, plaintiff's conclusory allegations are not sufficient to defeat the motion for summary judgment.

IV.

PLAINTIFF'S MOTION TO FILE SECOND AMENDED COMPLAINT; FOR ORDER TO STAY ALL PROCEEDINGS; AND CONTINUE MOTION CUT OFF DATES

A. *Plaintiff's Motion*

Plaintiff seeks to file a Second Amended Complaint ("SAC") substituting named parties for previously named individual Does. Those individuals, their positions, and the allegations against them[1] are as follows:

1. Dwight Helmick (former Deputy Commissioner of the CHP and Current CHP Commissioner). Accused of: (a)

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1. The accusations against these individuals are only stated in plaintiff's motion; they are not included in the SAC.

failing to respond to plaintiff's grievance; (b) "using CHP policies which constitute tampering with a witness;" (c) violating the MOU by failing to conduct an arbitration and not providing plaintiff with timely written notice of changes in wages, hours, and working conditions; and (d) failing to approve an adverse action against plaintiff.

2. Gloria Harmon (CEO of the SPB). Accused of: (a) failing to respond to plaintiff's letter demanding the hearing required by law; (b) failing to develop a system to insure employees who are given adverse actions receive hearings as required by law; (c) failing to prohibit the implementation of procedures by the CHP, CAHP and DPA that deny employees subject to adverse action a full evidentiary hearing before the SPB.

3. John D. Markey (Labor Representative of CAHP). Accused of: (a) making illegal use of the "side letter;" (b) failing to provide arbitration within the time frames required by the MOU; (c) failing to submit to the authority of plaintiff's designated lead counsel; and (d) refusing to provide a legal defense for plaintiff.

4. Richard Romansky (General Counsel for the CAHP). Accused of: see number 3 above.

5. Edmund Brehl (General Counsel for DPA). Accused of: developing the "side letter" that denied plaintiff his right to a full evidentiary hearing.

6. David Gilb (Assistant Chief, Labor Relations — agency not specified). Accused of: (a) refusing to respond to the issues raised in plaintiff's grievance; (b) refusing to provide a fair and impartial review of the grievance.

7. Ralph Tornatore, Jr. (CAHP Chief Negotiator). Accused of signing the secret "side letter" in his capacity as a representative of his agency.

8. Jack Pearson (DPA Chief Negotiator). Accused of: see number 7 above.

9. J.S. Farrington (CHP Negotiator). Accused of: see number 7 above.

Plaintiff explains that "there is a reason or reasons" that plaintiff did not name the above-listed individuals at the time of filing the original Complaint.

Plaintiff's proposed SAC does not allege any additional causes of action.

In the event the Court grants plaintiff's motion to amend, plaintiff further moves to extend the discovery and motion cut-off dates.

Finally, plaintiff asks the Court to stay all proceedings until plaintiff's appeal of the Court's order granting summary judgment in favor of CAHP is resolved.

B. *DPA's Opposition*

DPA contends that plaintiff's motion should be denied since no good cause has been shown for plaintiff's delay. DPA asserts that plaintiff learned of the operative facts during oral argument on July 19, 1995. Plaintiff has waited, however, until the "eleventh hour" to bring his motion to amend.

DPA further argues that plaintiff's motion is merely an attempt to "engraft" causes of action that have previously been rejected by the Court. DPA contends that plaintiff's conduct in continuing to pursue these actions is both reckless and in bad faith.

DPA next argues that plaintiff's allegations of Dills Act violations are unfair labor practices claims that must be brought before the California Public Employment Relations Board ("PERB"). DPA contends that, because these matters have not previously been directed to PERB, plaintiff has failed to exhaust his administrative remedies.

Finally, DPA contends that the acts complained of in plaintiff's SAC are official acts entitled to 11th Amendment immunity.

C. *CAHP's Opposition*

In light of the Court's denial of plaintiff's previous motion to amend, CAHP characterizes plaintiff's present motion as a motion for reconsideration. CAHP contends that plaintiff has not met the requirements for a motion for reconsideration and thus his motion must be denied.

CAHP next argues that plaintiff's motion is futile since the Court has determined, as a matter of law, that plaintiff did not sustain a deprivation of his civil rights. CAHP contends, therefore, that plaintiff's motion is frivolous.

CAHP further argues (without elaboration) that the CAHP and its agents and employees will be prejudiced if the Court allows plaintiff to file a SAC.

D. *Defendants Balducki, Dean, Dimino, Jones, Rengstorff, Towle and Tuck's Opposition*

Defendants oppose plaintiff's motion on the ground that it is untimely.

E. *Plaintiff's Reply*

Plaintiff reasserts that there are material issues of fact as to whether plaintiff was denied due process when he was removed from a specialty pay position. Plaintiff again urges that the issue is not whether the "side letter" meets the requirements of due process, but whether defendants violated the terms of that side letter when they denied plaintiff a hearing before the SPB.

Plaintiff further contends that defendants falsely assert that plaintiff refused to participate in arbitration. Plaintiff argues that an arbitrator was selected "behind the backs" of plaintiff and his counsel on a date that plaintiff's counsel was unable to attend.

DISCUSSION

A. *Plaintiff's Motion to File Second Amended Complaint*

Federal Rule of Civil Procedure 15(a) allows a party to amend its pleadings upon leave of the court. Such "leave shall be freely given when justice so requires." *Id.* Leave to file an amended complaint is appropriate, however, only if (1) defendants will not be unduly burdened, (2) plaintiff has acted in good faith, and (3) the amendment will not be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In light of the foregoing, plaintiff's Motion for Leave to

Amend Complaint is denied since the addition of these newly-named defendants would be futile. All of the allegations currently charged against these individuals were previously raised in some form in plaintiff's opposition to CAHP's Motion for Summary Judgment (although not directed at the specific defendants).[2] In spite of these claims, the Court found in its October 12, 1995, Order Granting Defendant CAHP's Motion for Summary Judgment that plaintiff was not denied his right to due process under the United States Constitution. Any attempt to assert nearly identical due process claims against the newly-named defendants would thus be unavailing.

B. *Plaintiff's Motion for Order to Stay All Proceedings*

Plaintiff's Motion for Order to Stay All Proceedings is denied as moot in light of the Ninth Circuit's January 26, 1996, dismissal of plaintiff's appeal of the Court's order granting summary judgment in favor of CAHP.

C. *Plaintiff's Motion to Continue Discovery and Motion Cut Off Dates*

In light of the foregoing, plaintiff's Motion to Continue Discovery and Motion Cut Off Dates is denied.

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2. Plaintiff does not appear to be claiming that these newly-named individuals participated in the alleged conspiracy to "improperly accuse plaintiff of conduct that would cause him to be removed from the air operations unit . . ." Complaint ¶ 31.

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V.

CONCLUSION

For the foregoing reasons, the Court grants defendants' Motion for Summary Judgment and denies plaintiff's Motion to File Second Amended Complaint; for Order to Stay All Proceedings; and Continue Discovery and Motion Cut Off Dates. The Court has this date modified, signed and filed defendants' Proposed Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment by Defendants Balducki, Bean, Dimino, Jones, Rengstorff, Towle and Tuck. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on all counsel of record.

Dated: April 2nd 1996.

s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SA CV 94-852 AHS (EEx)

DANIEL P. BRESNAHAN,

Plaintiff,

v.

CALIFORNIA HIGHWAY PATROL et al.,

Defendants.

JUDGMENT

The Court, having considered defendant California Highway Patrol's Motion to Dismiss; defendant California Association of Highway Patrolmen's Motion for Summary Judgment; defendant Department of Personnel Administration's Motion for Summary Judgment; and defendants Balducki, Bean, Dimino, Jones, Rengstorff, Towle and Tuck's Motion for Summary Judgment, and the Honorable Alicemarie H. Stotler, District Judge, having duly rendered decisions on March 27, 1995, October 12, 1995, March 20, 1996, and April 2, 1996, respectively, in the Court's Orders granting defendants' motions,

IT IS ORDERED AND ADJUDGED that:

the plaintiff take nothing against defendants in this action, that judgment be entered in favor of all defendants and that defendants recover their costs of this action.

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Dated: April 2, 1996.

s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FILED MARCH 20, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SA CV 94-852 AHS (EEx)

DANIEL P. BRESNAHAN,

Plaintiff,

v.

CALIFORNIA HIGHWAY PATROL, et al.,

Defendants.

ORDER GRANTING DEFENDANT DEPARTMENT OF PERSONNEL ADMINISTRATION'S MOTION FOR SUMMARY JUDGMENT

I.

PROCEDURAL HISTORY

On December 28, 1995, defendant Department of Personnel Administration ("DPA") filed a Motion for Summary Judgment. On January 22, 1996, plaintiff Daniel P. Bresnahan filed opposition. Defendant filed its reply on January 29, 1996. The matter was noticed for hearing on the Court's February 20, 1996, calendar.

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The Court found the matter appropriate for submission on the papers without oral argument. *See* Local Rule 7.11 (the Court may dispense with oral argument on any matter unless otherwise required); Fed. R. Civ. P. 78. The matter was, therefore, removed from the Court's February 20, 1996, hearing calendar.

II.

SUMMARY OF THE CASE

Plaintiff is a State Traffic Officer with the California Highway Patrol ("CHP"). Plaintiff was assigned as a helicopter pilot to the CHP's Border Division Air Operations Unit in Thermal, California. On March 22, 1993, plaintiff was notified that he was temporarily removed from flight status pending an internal CHP investigation into plaintiff's performance as a helicopter pilot and safety officer. On October 10, 1993, plaintiff received a Notice of Administrative Removal for Cause from the CHP.

The notice, dated September 29, 1993, informed plaintiff that the CHP investigation reached the following conclusions: (1) plaintiff did not utilize the departmental pre-flight start-up/ shut-down checklist prior to each flight as required; (2) plaintiff was involved in a preventable aircraft incident resulting in extensive damage to the division helicopter; (3) plaintiff used poor judgment in selecting a landing site on April 8, 1992; (4) plaintiff failed to make proper pre-flight weather checks and also failed to notify the communication center regarding an off-airport landing on October 12, 1992; and (5) plaintiff demonstrated poor flight safety judgment and violated departmental policy in late 1992 when landing near power lines at an off-airport site.

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The notice also stated: (1) plaintiff was "administratively removed" from his assignment at the Air Operations Program and his specialty flight pay would be discontinued; (2) plaintiff was reassigned to the Indio area; (3) the reassignment was not an "adverse action" or intended to be disciplinary; and (4) plaintiff was entitled to file an appeal per the provisions of Article V of the Grievance, Arbitration, and Complaint Procedures of the Unit 5 Memorandum of Understanding ("MOU") (collective bargaining agreement between the CHP and CAHP).

The MOU sets forth the grievance procedure: the employee must first discuss the matter informally with a supervisor and then he may go through four levels/steps of appeal. If the employee is not satisfied with the Department of Personnel Administration's ("DPA") decision in step 4, then he may appeal the decision to a neutral arbitrator jointly selected by the parties. If the parties cannot agree on an arbitrator, the American Arbitration Association or California State Mediation Service shall select an arbitrator. The arbitrator's decision is final and binding.

On October 29, 1993, plaintiff filed an Employee Contract Grievance, in accordance with the MOU. However, plaintiff proceeded through only four levels of the appeals process and failed to arbitrate the DPA's decision.

On September 20, 1994, plaintiff filed his Complaint in this action, alleging that defendants conspired to deprive him of his civil rights, in violation of 42 U.S.C. § 1983, by causing his transfer and denying him due process with respect to the grievance procedure. Plaintiff claims that he was entitled to a full administrative hearing before an administrative law judge, rather than the binding arbitration procedure afforded by the MOU. Plaintiff argues that but for a "secret" Side Letter

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Regarding Alternative Pay between the State of California and the CAHP, which provided that the MOU grievance procedures apply to his situation, his transfer would have been deemed an "adverse action," entitling him to the right to appeal the DPA decision to the State Personnel Board ("SPB"). Plaintiff seeks $2 hundred million in general damages and $2 hundred million in punitive damages.

DPA filed a Motion for Summary Judgment. DPA contends that, as a state agency, it is immune to suit under the 11th Amendment.

III.

THE PARTIES' CONTENTIONS

A. *Defendant's Moving Papers*

Defendant argues that, as a state agency, it is entitled to immunity from suit under the 11th Amendment.

B. *Plaintiff's Opposition*

Plaintiff initially argues that his removal from a specialty pay position constituted an adverse action that entitled plaintiff to a full administrative hearing before an administrative law judge. Plaintiff further alleges that the "side letter," implemented by defendant "in conspiracy with the CHP and CAHP," violated plaintiff's due process rights.

Plaintiff next contends that defendant is not entitled to protection under the 11th Amendment since plaintiff is only seeking injunctive relief. Plaintiff further notes that there is an exception to the general rule barring suit against state agencies

when state officials are sued in their individual capacities for violating plaintiffs' federally protected rights. Plaintiff asserts that the instant Complaint is "replete with such allegations."

C. *Defendant's Reply*

In response, defendant acknowledges that state officials are not immune from suits attempting to enjoin the continued enforcement of allegedly unconstitutional state laws. Defendant contends, however, that this exception does not apply when the relief sought is retroactive. Defendant argues that, where as here, a plaintiff seeks restoration to his former position, the suit is impermissible under the 11th Amendment. Defendant further contends that, contrary to plaintiff's assertions, the Complaint contains no request for injunctive relief and in fact demands monetary damages in the sum of $2 hundred million against defendants.

Finally, defendant argues that plaintiff is not entitled to an administrative hearing before the State Personnel Board. Defendant notes that even if removal from a specialty pay position is considered "adverse action," the Public Safety Procedural Bill of Rights Act (the "Act") only entitles plaintiff to "a hearing;" it does not guarantee a particular tribunal.

IV.

DISCUSSION

A. *The Summary Judgment Standard*

In order for a defendant to succeed on a motion for summary judgment, it must demonstrate that there is no genuine issue of material fact by pointing out the absence of evidence produced

by the plaintiff to support his case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In the alternative, a defendant may demonstrate affirmatively, through admissible evidence, that there is no triable issue of material fact as to each element of its affirmative defenses and that it is therefore entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). *See also Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

"A complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex*, 477 U.S. at 323. Where the material facts are under the moving party's control, the party's failure to produce such evidence may either preclude summary judgment or allow further discovery. *See Fontenot*, 780 F.2d at 1195. On the other hand, in order to overcome a defendant's motion for summary judgment, a plaintiff must set forth specific facts indicating that there is a genuine issue for trial. In other words, plaintiff must present evidence sufficient for a reasonable jury to find for him instead of defendant. Fed. R. Civ. P. 56(e). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Court is not to determine issues of credibility on a motion for summary judgment; instead, the truth of each party's affidavits must be assumed. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

B. *11th Amendment Immunity*

The 11th Amendment prohibits federal courts from entertaining suits brought by private citizens against any state in the absence of state consent. This immunity from private citizen suits extends to state agencies. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (holding that a suit brought against a state or one of its agencies falls within the proscription of the 11th Amendment). Absent express waiver

of sovereign immunity by the state, consent to suit in unequivocal terms, or clear abrogation of the state's 11th Amendment immunity by Congress, the action against a state agency is barred. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-240 (1985).

In the instant case, DPA, a state agency, is entitled to immunity under the 11th Amendment. Plaintiff has pointed to no evidence of a consent or abrogation of this immunity. Accordingly, plaintiff's suit is barred.[1]

V.

CONCLUSION

Accordingly, and for the foregoing reasons, the Court grants defendant DPA's Motion for Summary Judgment. The Court has this date modified, signed and filed defendant's proposed Statement of Uncontroverted Facts and Conclusions of Law.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on all counsel of record.

Dated: March 20, 1996.

s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

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1. The Court notes that, contrary to plaintiff's assertions, the Complaint seeks monetary damages against defendants in the amount of $2 hundred million. It does not seek injunctive relief.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FILED OCTOBER 12, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SA CV 94-852 AHS (EEx)

DANIEL P. BRESNAHAN,

Plaintiff,

v.

CALIFORNIA HIGHWAY PATROL, et al.,

Defendants.

ORDER GRANTING DEFENDANT CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN'S MOTION FOR SUMMARY JUDGMENT

I.

PROCEDURAL HISTORY

On March 1, 1995, defendant California Association of Highway Patrolmen ("CAHP") filed a Motion for Summary Judgment. Having been served earlier, plaintiff filed opposition on February 17, 1995. Initial oral arguments were heard on March 27, 1995. The Court ordered the parties to file supplemental briefs. CAHP filed its supplemental brief on April 27, 1995, and plaintiff filed his supplemental opposition on May

19, 1995. The Court entertained additional oral argument on July 19, 1995, after which the motion was submitted.

II.

SUMMARY OF THE CASE

Plaintiff is a State Traffic Officer with the California Highway Patrol ("CHP"). Plaintiff was assigned as a helicopter pilot to the CHP's Border Division Air Operations Unit in Thermal, California. On March 22, 1993, plaintiff was notified that he was temporarily removed from flight status pending an internal CHP investigation into plaintiff's performance as a helicopter pilot and safety officer. On October 10, 1993, plaintiff received a Notice of Administrative Removal for Cause from the CHP.

The notice, dated September 29, 1993, informed plaintiff that the CHP investigation reached the following conclusions: (1) plaintiff did not utilize the departmental pre-flight start-up/ shut-down checklist prior to each flight as required; (2) plaintiff was involved in a preventable aircraft incident resulting in extensive damage to the division helicopter; (3) plaintiff used poor judgment in selecting a landing site on April 8, 1992; (4) plaintiff failed to make proper pre-flight weather checks and also failed to notify the communication center regarding an off-airport landing on October 12, 1992; and (5) plaintiff demonstrated poor flight safety judgment and violated departmental policy in late 1992 when landing near power lines at an off-airport site.

The notice also stated: (1) plaintiff was "administratively removed" from his assignment at the Air Operations Program

and his specialty flight pay would be discontinued; (2) plaintiff was reassigned to the Indio area; (3) the reassignment was not an "adverse action" or intended to be disciplinary; and (4) plaintiff was entitled to file an appeal per the provisions of Article V of the Grievance, Arbitration, and Complaint Procedures of the Unit 5 Memorandum of Understanding ("MOU") (collective bargaining agreement between the CHP and CAHP).

The MOU sets forth the grievance procedure: the employee must first discuss the matter informally with a supervisor and then he may go through four levels/steps of appeal. If the employee is not satisfied with the Department of Personnel Administration's ("DPA") decision in step 4, then he may appeal the decision to a neutral arbitrator jointly selected by the parties. If the parties cannot agree on an arbitrator, the American Arbitration Association or California State Mediation Service shall select an arbitrator. The arbitrator's decision is final and binding.

On October 29, 1993, plaintiff filed an Employee Contract Grievance, in accordance with the MOU. However, plaintiff proceeded through only four levels of the appeals process and failed to arbitrate the DPA's decision.

On September 20, 1994, plaintiff filed his Complaint in this action, alleging that defendants conspired to deprive him of his civil rights, in violation of 42 U.S.C. § 1983, by causing his transfer and denying him due process with respect to the grievance procedure. Plaintiff claims that he was entitled to a full administrative hearing before an administrative law judge, rather than the binding arbitration procedure afforded by the MOU. Plaintiff argues that but for a "secret" Side Letter Regarding Alternative Pay between the State of California and

the CAHP, which provided that the MOU grievance procedures apply to his situation, his transfer would have been deemed an "adverse action," entitling him to the right to appeal the DPA decision to the State Personnel Board ("SPB"). Plaintiff seeks $2 million in general damages and $2 million in punitive damages.

CAHP filed a Motion for Summary Judgment. CAHP contends that the grievance procedure afforded to plaintiff by the terms of the MOU fully comports with due process. Thus, CAHP asserts, as a matter of law, plaintiff has failed to raise any issue of material fact that would support his claim that CAHP conspired to deprive him of due process in violation of his civil rights.

III.

DISCUSSION

A. *The Summary Judgment Standard*

In order for a defendant to succeed on a motion for summary judgment, it must demonstrate that there is no genuine issue of material fact by pointing out the absence of evidence produced by the plaintiff to support his case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In the alternative, a defendant may demonstrate affirmatively, through admissible evidence, that there is no triable issue of material fact as to each element of its affirmative defenses and that it is therefore entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). *See also Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

"A complete failure of proof concerning an essential element

of the nonmoving party's case renders all other facts immaterial." *Celotex*, 477 U.S. at 323. Where the material facts are under the moving party's control, the party's failure to produce such evidence may either preclude summary judgment or allow further discovery. *See Fontenot*, 780 F.2d at 1195. On the other hand, in order to overcome a defendant's motion for summary judgment, a plaintiff must set forth specific facts indicating that there is a genuine issue for trial. In other words, plaintiff must present evidence sufficient for a reasonable jury to find for him instead of defendant. Fed. R. Civ. P. 56(e). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Court is not to determine issues of credibility on a motion for summary judgment; instead, the truth of each party's affidavits must be assumed. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

B. *Was Plaintiff Entitled to Due Process Regarding his Removal from a Specialty Pay Position?*

Plaintiff alleges that CAHP violated his civil rights when it conspired to deprive him of due process with respect to his removal from a specialty pay position. Plaintiff alleges that CAHP implemented a secret side letter to the MOU, which limited him to the grievance procedure set forth in the MOU. Plaintiff claims that this deprived him of due process because, as provided by Cal. Gov't Code § 3304, he was entitled to a full administrative hearing.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests . . . ." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Thus, plaintiff's due process claim depends upon his having a property or liberty interest in maintaining his

specialty pay position. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 537 (1985). "Property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

The Public Safety Officers Bill of Rights Act, Cal. Gov't Code § 3304(b), provides in relevant part:

> No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

The California Supreme Court has held that "a decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in nature, and that the officer therefore must be afforded the 'opportunity for [an] administrative appeal.' " *White v. County of Sacramento*, 31 Cal. 3d 676, 683-84 (1982).

Cal. Gov't Code § 3304(b) does not specify how the appeal process is to be implemented, and California courts have held that the procedural details of the appeal required by § 3304(b) are to be formulated by the local agency. *Stanton v. City of West Sacramento*, 226 Cal. App. 3d 1438, 1443 (1991). However, "the adequacy of the appeal procedure afforded must be measured according to constitutional due process principles." *Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1806 (1993).

Thus, the California statute appears to create a property interest in maintaining a specialty pay position. Plaintiff has been reassigned to a lower-paying position. Accordingly,

California Law entitles plaintiff to an administrative appeal, in accordance with due process.

C. *Did the Procedures Afforded Plaintiff Comport with Due Process?*

Plaintiff alleges that the grievance procedure set forth in the MOU does not provide him with a meaningful opportunity for an administrative appeal, nor does it comport with due process, because it does not provide for a full administrative hearing.

"[O]nce it is determined that the Due Process Clause applies, the question remains what process is due." *Loudermill*, 470 U.S. at 541. The answer to that question is not found within the state statute, but instead must be determined in accordance with the Constitutional guarantees of the Due Process Clause. *Id.*[1]

---

1. The parties engage in lengthy argument as to whether removal from a specialty pay position constitutes an "adverse action." An adverse action is one that is undertaken for the purpose of discipline. *See* California Code of Regulations, Title 2, Art. 4, ¶ 51.1(b). The notice of removal stated that the removal was not an adverse action, i.e., it was not initiated for disciplinary purposes.

White establishes that the removal, whether intended as discipline or not, is punitive and requires an administrative hearing. Thus, once plaintiff's due process rights are implicated, whether the action is to be termed "adverse" is of little or no import. The Court must simply determine whether the procedures afforded provided plaintiff with due process. Accordingly, the Court need not resolve the semantic battle over whether the administrative removal should have been termed an "adverse action."

Appendix D

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner." *Mathews*, 424 U.S. at 332. That is, "essential requirements of due process . . . are notice and an opportunity to respond." *Loudermill*, 470 U.S. at 545.

Plaintiff insists that his right to a meaningful opportunity to be heard requires that he be afforded a full administrative hearing. Plaintiff asserts that the arbitration denies plaintiff many safeguards that would be available in a full administrative hearing, such as: the right to judicial appeal; the right to introduce evidence and testimony; the right to establish precedent; and the right to be considered innocent until proven guilty. Defendants assert that the procedure afforded by the MOU is sufficient to comport with due process.

A determination of whether the administrative procedures provided are constitutionally sufficient requires a balance of the government and private interests affected. *Mathews*, 424 U.S. at 334. Three factors are considered in reaching this balance: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the burdens that such additional or substitute procedures would entail. *Id.* at 335.

The arbitration procedure detailed in the MOU provides for an impartial arbitrator. Pl.'s Supplemental Br., Ex. 10 "B" (MOU at 23). Furthermore, the arbitration proceeding provided for by the MOU is a "full evidentiary hearing." Pl.'s Supplemental Br., Ex. 10 "M" (CAHP's Mar. 18, 1994, letter to plaintiff). Although CAHP asserted that it would not argue at

the arbitration that the grievance procedure set forth in the MOU violates plaintiff's rights under the *White* decision, CAHP maintained that it would fully represent plaintiff with respect to the removal from his flight position. *Id.* Lastly, the CAHP stated that it had "no objection" to plaintiff appearing at the arbitration proceeding with his private counsel. Pl.'s Supplemental Br., Ex. 10 "L" (CAHP's Feb. 14, 1994, letter to plaintiff).

Although plaintiff did not avail himself of the arbitration procedure set forth in the MOU, plaintiff has presented no evidence that the procedure would not provide him with a meaningful opportunity to be heard. Plaintiff had the opportunity to appear, with private counsel, before a neutral arbitrator and present evidence on his behalf. Furthermore, the CAHP agreed to fully represent plaintiff with respect to his removal from flight status.

Given these facts, the Court concludes that, as a matter of law, the arbitration procedure set forth in the MOU fully complied with the due process requirements of the United States Constitution. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981) ("Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.").

Plaintiff also asserts that defendants failed to provide him with the arbitration within the time specified in the MOU. The MOU provides that the CAHP shall submit a written demand to the DPA within 30 days of the adverse decision. Pl.'s Supplemental Br., Ex. 10 "B" (MOU at 22). After receipt of the demand, an arbitrator shall be selected within ten working days

and the arbitration shall commence within sixty days after selecting the arbitrator. *Id.* (MOU at 23).

The "Level Four Decision" was rendered January 31, 1994. On February 14, 1994, the CAHP notified plaintiff that it would request arbitration on his behalf. Pl.'s Supplemental Br., Ex. 10 "L" (CAHP's Feb. 14, 1994, letter to plaintiff). It appears that the arbitrator was not selected until July 1, 1994, and the arbitration was not scheduled to commence until September 29, 1994. Pl.'s Supplemental Br., Ex. 10 "N" (CAHP's July 1, 1994, letter to Gentile (selected arbitrator)).

However, delay alone, is insufficient to establish a denial of due process. *See Loudermill*, 470 U.S. at 546-547, 547 n.11 (holding that a two-and-a-half-month delay between the time an employee filed his appeal and the time he received a hearing was not unconstitutionally lengthy, despite the fact that the statute provided that the hearing occur within 30 days of the appeal). Moreover, it appears from the correspondence between the parties that the delay was largely attributable to plaintiff's own lack of cooperation. Accordingly, the Court concludes that the delay in selecting an arbitrator and commencing the arbitration did not constitute a violation of plaintiff's due process rights.

IV.

CONCLUSION

Accordingly, and for the foregoing reasons, the Court grants defendant CAHP's Motion for Summary Judgment.

IT IS SO ORDERED.

Appendix D

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on all counsel of record.

Dated: October 12, 1995.

s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-55611

D.C. No. CV-94-00852-AHS

DANIEL P. BRESNAHAN,

Plaintiff-Appellant,

v.

CALIFORNIA HIGHWAY PATROL; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ROBERT RENGSTORFF, Assistant Commissioner Field; RONALD JONES, Officer; JAMES BALDUCKI, Sergeant; MICHAEL DOMINO, Sergeant; WESLEY BEAN, Sergeant; CLARENCE TUCK, Deputy Chief; GENE TOWLE, Captain,

Defendants-Appellees.

ORDER

Before: HALL, and T.G. NELSON, Circuit Judges, and WINMILL,** District Judge.

Appellant's petition for rehearing is DENIED.

** Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

No. 97-1118

(2)

Supreme Court, U.S.
FILED
FEB 6 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

DANIEL P. BRESNAHAN,

Petitioner,

vs.

CALIFORNIA HIGHWAY PATROL; DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ASSISTANT COMMISSIONER FIELD ROBERT RENGSTORFF; OFFICER RONALD JONES; SERGEANT JAMES BALDUCKI; SERGEANT MICHAEL DOMINO; SERGEANT WESLEY BEAN; DEPUTY CHIEF CLARENCE TUCK; CAPTAIN GENE TOWLE; and DOES 1 through 100, Inclusive,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ARGUMENT

Introduction

The district court and the court of appeals both applied the well-established rule that the Eleventh Amendment ("Eleventh Amendment") prohibits private suits against states in federal court. In the circumstances here, both courts ruled that because Petitioner pointed to no evidence of consent or abrogation of Eleventh Amendment immunity, Petitioner's suit against all defendant state agencies and officials is barred. In addition, both courts agreed that even if Petitioner had established consent or abrogation of this immunity, Petitioner failed to raise any issues of material fact that would support his claim that the defendants conspired to deprive him of due process in violation of his civil rights.

The certiorari petition argues that the decisions below are in conflict with prior court decisions in deciding that Respondents were entitled to Eleventh Amendment immunity. The petition also argues that the decisions below depart from the accepted or usual course of judicial proceedings in failing to conclude that Petitioner was denied due process. Finally, Petitioner argues the decisions below erroneously concluded that Petitioner was not entitled to a jury trial because he presented no admissible evidence to support his claims that he was denied due process. As we now show, none of these arguments is a sufficient basis to grant the petition. The decision below simply follows well settled law, correctly applies that law to uncontested facts, and does so without working any intrusion upon Petitioner's constitutional rights.

A. The Decision Below Correctly Applies Well-Established Eleventh Amendment Law.

The Eleventh Amendment is a well-established limitation upon actions against states. It provides:

> The judicial power . . . shall not . . . extend to any suit in law or equity . . . against one of the United States by Citizens of another state or by citizens or subjects of any Foreign State.

U.S. Const., Amend. XI

This amendment has been interpreted to mean that an unconsenting state is immune from private suits brought in federal court by its own citizens or citizens of another state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Papasan v. Allain*, 478 U.S. 265, 276 (1986). The basis for this jurisdictional limit on Article III judicial power is that

> each state is a sovereign entity in the federal system . . . and . . . it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 1122 (1996). Therefore, in order to avoid Eleventh Amendment immunity, a Petitioner must show express waiver of sovereign immunity by the state by consent in unequivocal terms, or clear abrogation of the state's Eleventh Amendment immunity by Congress. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-240 (1985).

Eleventh Amendment immunity can be waived by a state only if the waiver is "express and unequivocal." *Pennhurst*,

465 U.S. at 99. This requires that the waiver is stated in the most express language or by such overwhelming implication from the text [of state legislation] that there is no room for any other reasonable construction. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990); *Micomonaco v. State of Washington*, 45 F.3d 316, 319 (9th Cir. 1995). *See Mueller v. Thompson*, __ F.3d __, 1998 WL 17903 at *3 (7th Cir. 1998), remanded by the Court for reconsideration in light of *Seminole* in *Wisconsin v. Mueller*, __ U.S. __, 117 S. Ct. 1077 (1997). Petitioner fails to present in his petition any claim of consent by waiver of the Eleventh Amendment in his suit against the Department of Personnel Administration.

Congress has limited power to override the Eleventh Amendment pursuant to a constitutional provision specifically granting Congress such power. *Seminole Tribe*, 517 U.S. 44, 116 S. Ct. at 1125 (1996). Congress' intent to override the Eleventh Amendment and permit suits against the states must be "unmistakably clear in the language of the statute itself." *Scanlon*, 473 U.S. at 242 (1985). Petitioner does not claim in his petition that Congress has abrogated the state's Eleventh Amendment immunity in this case. Therefore, this exception does not apply here.

Petitioner has noted that there is an exception to the Eleventh Amendment's general rule barring suits against state agencies under *Ex Parte Young* [209 U.S. 123 (1908)]. The *Young* exception allows suits against state agencies where state officials are sued in their individual capacities for prospective injunctive relief. *See id.* at 160. This exception does not allow suits for retroactive money damages against a state or state official. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 664-67 (1974) (holding *Young* inapplicable to claims for retroactive or damages relief against the state treasury and limiting the doctrine to actions for prospective relief). In the instant case, Petitioner seeks retroactive relief; namely, restoration to his former position. In addition, Petitioner has made no request for injunctive relief and in fact demands monetary

damages in the sum of $2 hundred million dollars each for general and punitive damages against Respondents. Therefore, the *Young* exception in no way applies to this case and Petitioner's suit is impermissible under the Eleventh Amendment.

B. The Decision Below Correctly Found That The Grievance-Arbitration Procedure To Which Plaintiff Was Entitled Satisfied Due Process Requirements.

The decision below properly concluded that the arbitration procedure set forth in Article V of the Grievance, Arbitration, and Complaint Procedures of the Unit 5 Memorandum of Understanding ("MOU") fully complied with the due process requirements of the United States Constitution.

Petitioner alleges that his civil rights were violated because the Respondents deprived him of due process by removing him from a specialty pay position. He argues that this action entitled him to a full administrative hearing pursuant to California Government Code § 3304. This position is based on the presumption that he had a property or liberty interest in maintaining his specialty pay position. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 537 (1985). The Public Safety Officers Bill of Rights Act, California Government Code § 3304(b), provides in pertinent part:

> No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

Pursuant to this statute, the California Supreme Court has held that

> a decision to reassign a peace officer to a lower paying position is per se disciplinary . . . and that the officer therefore must be afforded the "opportunity for administrative appeal."

White v. County of Sacramento, 31 Cal. 3d 676, 683-84 (1982). However, California Government Code § 3304 does not specify how the appeal process is to be implemented, and California courts have held that the procedural details are to be formulated by the local agency subject to minimal constitutional due process principles. *See Stanton v. City of West Sacramento*, 226 Cal. App. 3d 1438, 1443 (1991); *Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1806 (1993).

Thus, California law appears to create a property interest in maintaining a specialty pay position. Because Petitioner was reassigned to a lower-paying position, he was entitled to an administrative appeal, in accordance with due process. However, the decisions below properly concluded that the arbitration process to which Petitioner was entitled provided adequate due process; it included an opportunity to be heard, a full evidentiary hearing, and an impartial decision-maker. The Court has previously determined that although the state remedies may not provide a Petitioner with all the relief which may have been available if he could have proceeded under 42 U.S.C. § 1983, that does not mean that the state remedies are inadequate to satisfy the requirements of due process. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981) [reversed on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986)].

Although the state arbitration process is final and binding, it is also subject to state court review as appropriate under the California Code of Civil Procedure [§ 1286.2(a) through (e)]. Several grounds are available for vacating an award, including if the award is procured by corruption of the arbitrator; if the rights of the party seeking vacation of the award were

substantially prejudiced by neutral arbitrator misconduct; if the arbitrator exceeded his or her power and the award cannot be corrected without affecting the decision's merits; and if the rights of the party seeking vacation were substantially prejudiced by the arbitrator's refusal to postpone a hearing upon sufficient showing of cause or the refusal to hear evidence material to the controversy. *See id.* Therefore, the arbitration process satisfies due process and is subject to court review for failure to adhere to such requirements.

As noted by the decisions below, Petitioner failed to avail himself of the arbitration procedure set forth in the MOU, and later tried to argue that the procedure would not have provided him with a meaningful opportunity to be heard. Plaintiff was given the opportunity to appear, with private counsel, before a neutral arbitrator and present evidence on his behalf. He failed to do so, justifying his failure by arguing that the Respondents took too long to select an arbitrator. However, delay alone is insufficient to establish a denial of due process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546-547 (1985) (holding that a two-and-a-half month delay between the time an employee filed his appeal and the time he received a hearing was not an unconstitutional delay, even if the statute provided for a hearing within 30 days of the appeal).

Given these facts, the decisions below properly concluded that, as a matter of law, the arbitration procedure set forth in the MOU fully complied with the due process requirements of the United States Constitution. Therefore, Petitioner fails to present in this petition a due process argument that justifies review.

C. There Was No Abuse Of Discretion By The Courts Below That Justifies Granting The Petition In The Instant Case.

Petitioner argues that the courts below abused their discretion by granting summary judgment when genuine issues

of material fact remained, and in denying Petitioner's motion to file a second amended complaint. However, Petitioner was afforded adequate due process through the arbitration procedure as a matter of law, and provided no specific acts by any of the Respondents to support his allegations. In addition, Petitioner failed to show good cause why he should be allowed to file a second amended complaint to substitute named parties for previously named individual Does.

Petitioner presented no admissible evidence to support his claims that Respondents: (1) failed to apply with the MOU; (2) improperly investigated Petitioner; or (3) made false allegations and relied on inadmissible evidence to support Petitioner's removal from his specialty pay position. Petitioner argues that his evidence can be found in the complaint and in depositions which were never lodged with the courts below. This "evidence" fails to comply with Federal Rule of Civil Procedure 56(e). Therefore, the courts below properly granted summary judgment for Respondents because Petitioner failed to provide the requisite evidentiary support.

Petitioner sought to file a second amended complaint to substitute named parties and allegations for previously named individual Does. However, all of the due process allegations against the newly-named respondents were previously raised by Petitioner in some form and had been disposed of by the court in the prior summary judgment proceeding. Therefore, Petitioner failed to show good cause for the delay or why the amendment would not be futile as required by Federal Rule of Civil Procedure 15(a) and *Foman v. Davis* [371 U.S. 178 (1962), holding that as a prerequisite to granting leave to amend it must be shown that the underlying facts or circumstances relied upon by plaintiff might be a proper subject of relief (371 U.S. at 182)].

CONCLUSION

Petitioner has failed to present any claim of consent, abrogation, or evidence of an exception to the states' Eleventh Amendment immunity to suits in federal court. Petitioner has failed to present any evidence that the arbitration procedure to which he was entitled denied him due process. Petitioner has failed to show any abuse of discretion by the courts below. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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No. 97-1118 (3)

Supreme Court, U.S.
FILED
MAR 6 1998
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In The
Supreme Court of the United States

October Term, 1997

DANIEL P. BRESNAHAN,

Petitioner,

vs.

CALIFORNIA HIGHWAY PATROL; DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ASSISTANT COMMISSIONER FIELD ROBERT RENGSTORFF; OFFICER RONALD JONES; SERGEANT JAMES BALDUCKI; SERGEANT MICHAEL DOMINO; SERGEANT WESLEY BEAN; DEPUTY CHIEF CLARENCE TUCK; CAPTAIN GENE TOWLE; and DOES 1 through 100, Inclusive,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN

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STATEMENT OF THE CASE

The Petition seeks this Court's review of the Ninth Circuit Court's ruling affirming the District Court's opinion granting Summary Judgment in favor of the Respondent California Association of Highway Patrolmen ("CAHP"). Petitioner repeatedly contends that he did not have "any hearing" and as a result of due process was denied. Respondent CAHP contends that the fundamental requirement for due process is not whether a hearing was conducted but whether Petitioner had the *opportunity* to be heard at a meaningful time in a meaningful manner.

Petitioner is a State Traffic Officer with the California Highway Patrol ("CHP") who was temporarily removed from his flight status pending an internal CHP investigation into his performance as a helicopter pilot. Petitioner received a notice of administrative removal for cause, flight pay was discontinued, and he was reassigned. App. 29a.

CAHP is the exclusive representative and negotiation agent for all sworn members of the Department of California Highway Patrol. The Memorandum of Understanding ("MOU") was entered into on July 1, 1992 and is the agreement between the State of California and the CAHP. App. 30a.

Petitioner, a member of CAHP, was entitled to file an appeal pursuant to the provisions of Article V of the Grievance, Arbitration, and Complaint Procedures of the Unit 5 of the MOU. The MOU sets forth the grievance procedure which involves four levels/steps of appeal. If a member is not satisfied at the fourth level of appeal to the Department of Personnel Administration ("DPA") then he may appeal that decision to a neutral arbitrator jointly selected by the parties or selected by the American Arbitration Association of California State

Mediation Service. The arbitrator's decision is final and binding. App. 30a.

A. The Four Level/Step Grievance Procedure with Binding Arbitration meets due process requirements.

It is well established that "due process is flexible and calls for such procedural protection as the particular situation demands." *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976).

In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, the Court held that a state confirmed property interest in continued employment cannot be deprived without due process of law. The Court found that the employer must provide a hearing; however, a hearing need not be elaborate.

> The essential requirement of due process . . . are notice and opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 545 (1985)

The requirements of due process are articulated in *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976):

> The fundamental requirements of due process is the opportunity to be heard "at a meaningful time in a meaningful manner". (Quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)

The lower court correctly determined as a matter of law that the four level/step grievance procedure that culminates with binding arbitration satisfies due process requirements and relied upon well settled law. App. 36a.

B. Petitioner had the opportunity to be heard at a meaningful time in a meaningful manner.

The lower court found that the Petitioner availed himself to four level/step grievance procedure as articulated in the MOU but failed to appear at arbitration. App. 36a. The District Court found that Plaintiff had the *opportunity* to appear at arbitration with private counsel before a neutral arbitrator and present evidence on his behalf. App. 36a. The Arbitration provided in the MOU is a full evidentiary hearing. App. 35a. The lower court correctly found that Petitioner had the *opportunity* to be heard in a meaningful hearing that comported with due process requirements of the Constitution of the United States. App. 36a. It was Petitioner who failed to avail himself to binding arbitration; a delay in selecting an arbitrator does not constitute a violation of due process. App. 37a.

C. There is no conflict between the United Supreme Court and the California Supreme Court as to due process.

The California Supreme Court has held that a decision to reassign a police officer to a lower paying position is per se disciplinary or punitive in nature and that the officer must therefore be afforded the "opportunity for [an] administrative appeal." *White v. County of Sacramento*, 31 Cal. 3d 676, 683-84 (1982). However, California Government Code § 3304(b) does not detail how the appeal process is to be implemented. Appeal processes can be formulated by the local agencies, *Stanton v. City of West Sacramento*, 226 Cal. App. 3d 1483, 1443 (1991), and "the adequacy of the appeal procedure forwarded must be measured according to the Constitutional due process principals." *Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1806 (1993). Under California law, Petitioner is entitled to an administrative appeal that provides due process. App. 34a. Since the lower court determined that the arbitration

procedure set forth in the MOU fully complied with the due process clause; there is no conflict.

D. There was no abuse of discretion by the lower court.

The Petitioner's fact bound claim that the courts below abused it's discretion does not warrant review by this Court. The decision below correctly applied the facts to well established law. Petitioner has failed to present admissible evidence to support his claim of denial of a meaningful opportunity to be heard. App. 36a.

CONCLUSION

The four level/step grievance and arbitration procedure set forth in the MOU fully complies with the due process requirements and Petitioner had the opportunity for a meaningful hearing in a meaningful manner. Petitioner has presented no admissible evidence to establish that his due process rights were violated. For the reasons given above, and for those given in Respondent Department of Personnel Administration's brief in opposition, the petition should be denied.

Respectfully submitted,

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No. 97-1118 (4)

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In The

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October Term, 1997

DANIEL P. BRESNAHAN,

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Respondents.

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENTS HAVE PRESENTED NO ARGUMENT OR AUTHORITY IN OPPOSITION TO PETITIONER'S CLAIM THAT, HAVING RECEIVED AN ADVERSE ACTION WHICH RESULTED IN THE LOSS OF PROPERTY (SALARY) AND PRIVILEGE (FLIGHT TIME), HE NEVER RECEIVED ANY HEARING, AND THEREFORE WAS DENIED DUE PROCESS.

The issue before the Court is whether Petitioner was denied due process for never having received any hearing or trial, subsequent to Petitioner's loss of federally protected rights of both property (salary) and privilege (flight time).

The Respondents would have the Court believe they don't have to actually provide Petitioner a hearing: they only have to *promise* that they will. This amazing premise is evidenced in the following statement:

> Respondent CAHP contends that the fundamental requirement for due process is not whether a hearing was conducted but whether Petitioner had the opportunity to be heard at a meaningful time in a meaningful manner.

(CAHP Brief in Opposition, p. 1). This flawed premise is in direct contravention to the law.

The Petition makes it abundantly clear that this Court has long held that denial of *any* hearing following the loss of federally protected rights is an absolute denial of due process. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Parratt v. Taylor*, 451 U.S. 527, 540, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

The Respondents have provided absolutely no argument or authority to overcome the laws concerning denial of due process provided by Petitioner. Respondents are now prohibited from raising any objection or providing any authorities, per United States Supreme Court Rule 15.2.

Respondent CHP and individual CHP Respondents Balducki, Bean, Dimino, Jones, Rengstorff, Towle, and Tuck, failed to submit any argument in opposition and are now prohibited from doing so by United States Supreme Court Rules 15.2 and 15.3.

II.

RESPONDENT DPA FALSELY CLAIMS THAT, AS A STATE AGENCY, IT IS PROTECTED FROM FEDERAL SUIT BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent DPA's claim is non responsive to the only issue in the Petition before this Court, *i.e.* whether Petitioner was denied due process by having been denied any hearing or trial, following a loss of federally protected rights of property (salary) and privilege (flight time). Respondent DPA's claim that it is protected from suit by the Eleventh Amendment, does not overcome the issue before this Court of the denial of Petitioner's due process rights. In any event, Respondent DPA's claim that it is protected from suit, by the Eleventh Amendment, is false for the following reasons.

Petitioner's suit is based solely on denial of his due process rights. Petitioner is not seeking monetary relief or any retroactive relief from the state agencies. He is seeking *only* prospective injunctive relief from the state agencies involved (CHP and DPA). That specifically defeats any claim of Eleventh Amendment protection by those state agencies.

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) states:

> A federal courts remedial power, consistent with the 11th amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the treasury.

Respondent DPA's claim that Petitioner is seeking retroactive relief from a state agency, is false. Respondent DPA's claim that Petitioner is seeking monetary relief from a state agency, is false. Respondent DPA's claim that Petitioner has made no request for injunctive relief, is false. The state agencies in the instant case, have no protection under the Eleventh Amendment.

In addition, the individual Respondents and Does of the state agencies have no protection under the Eleventh Amendment because a suit challenging the federal constitutionality of a state official's action is not one against the state. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). The Defendants denied Petitioner due process, having failed to provide a hearing following loss of federally protected rights of property (salary) and privilege (flight time). Failure to provide due process strips the individual Defendants of any protection under the Eleventh Amendment. An unconstitutional state enactment is void, and any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity.

Young, supra, at 159-160 states:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution,

> the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

In the instant case, in addition to the state agency Respondents and Does, not having any protection under the Eleventh Amendment; the individual Respondents and Does of the state agencies have no protection under "Qualified Immunity".

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) states:

> The test for applying qualified immunity requires a finding that the official conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Qualified immunity is defeated if an official knew or reasonable should have known that the action that he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

The Respondents knew that a hearing was required following Petitioner's loss of federally protected rights of property (salary) and privilege (flight time), but failed to provide *any* hearing. In accordance with *Harlow, supra*, the Defendants are denied qualified immunity.

The state agency individual Respondents, having been stripped of their official capacity, and remaining only in their individual capacity, are subject to suit in the instant case. This allows monetary damages to be awarded against those Defendants. *Scheuer v. Rhodes*, 416 U.S. 232, 237-238, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

Respondent DPA falsely claimed that they were protected from suit by the Eleventh Amendment. In support of that false claim they cited *Edelman, supra*; *Young, supra*; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Papasam v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). It is ironic that these very cases cited by Respondent DPA strongly and clearly reinforce why DPA and CHP are *not* entitled to Eleventh Amendment protection, and the individual state agency Respondents and Does are *not* entitled to qualified immunity.

Finally, Respondent CAHP, and individual Does, have neither Eleventh Amendment nor qualified immunity protection, as they are not State agencies or State employees.

III.

RESPONDENTS CAHP AND DPA FALSELY CLAIM THAT A HEARING PROCESS, WHICH IS PROHIBITED BY LAW AND WHICH WAS DENIED PETITIONER, PROVIDED DUE PROCESS.

The Respondents have attempted to confuse the courts by continuing to argue that a collective bargaining arbitration process is applicable to the instant case, and that the arbitration process meets due process. That argument is moot. However, to protect Petitioner's right to argue the issue, the following is provided:

The only issue before this Court is whether Petitioner was denied due process by having been denied *any* hearing or trial, following loss of federally protected rights of property (salary) and privilege (flight time). The Respondents failed to provide *any* hearing, thus denying Petitioner due process. *Mathews, supra*; and *Parratt, supra*. The Respondents failed to provide the State Personnel Board hearing required by California law (Petitioner's Brief, p. 4). Denial of that hearing, required by law is a denial of due process (Petitioner's Brief, p. 7). *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678 (1875). The Respondents, while denying the hearing required by law, forced Petitioner into a form of hearing (Arbitration) prohibited by law, then denied even that hearing. The Respondents have continued to present issues which are moot, and cite cases which are inapplicable. All of the Respondents' arguments are non responsive to the issue before this Court, and do not overcome the law cited by Petitioner which establishes that he was denied due process when he was denied *any* hearing or trial.

CONCLUSION

PETITIONER WAS DENIED DUE PROCESS WHEN HE WAS DENIED *ANY* HEARING, FOLLOWING LOSS OF FEDERALLY PROTECTED RIGHTS OF PROPERTY (SALARY) AND PRIVILEGE (FLIGHT TIME).

The Respondents denied Petitioner due process by never providing *any* hearing, and the courts, without any discretionary powers to do so, subsequently denied Petitioner his right to jury trial. The Respondents have not provided any authority or argument which overcomes the law cited by Petitioner, which shows that he was denied due process. Instead, the Respondents, without filing a cross-petition, have attempted to raise issues not included in Petitioners' Brief, and which are moot.

Respondents DPA, CHP, named CHP Defendants, and Does, have no protection under either the Eleventh Amendment or qualified immunity.

Petitioner was denied his due process right to hearing and trial. The court should grant the Writ of Certiorari and rule per curiam, as requested in the Petition.

Respectfully submitted,

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